LEMBAGA KEMAJUAN TANAH PERSEKUTUAN & ANOR V. DATUK SERI DR WAN AZIZAH WAN ISMAIL & ORS

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID J
[SUIT NO: S21-208-2010]
17 OCTOBER 2014

TORT: *Defamation – Libel – Action by statutory government body and/or public authority – Whether plaintiffs local authorities – Whether s. 15(1) of Land Development Act 1956 provided plaintiffs right to sue and be sued – Rationale for allowing statutory authority to be able to sue for libel – Whether to protect damage to reputation*

CONSTITUTIONAL LAW: *Fundamental – Freedom of expression – Whether limited – Whether subject to restrictions – Whether there was balance between protection of reputation and freedom of expression – Whether defence of fair comment, justification and privilege exist as protection to freedom of expression – Federal Constitution, art. 10*

The plaintiffs' action against the defendants was for the tort of defamation over an article in the edition of Suara Keadilan. At the outset, the first, second and sixth defendants raised a preliminary issue as to whether the first plaintiff ('Felda'), being a statutory authority set up under the Land Development Act 1956 ('the Act'), and the second plaintiff, Felda Global Ventures Holdings Sdn Bhd a wholly owned subsidiary of the first plaintiff, had the necessary capacity to bring an action for defamation and malicious falsehood. Relying on the English case of *Derbyshire County Council v. Times Newspaper Ltd & Ors* ('*Derbyshire*'), the defendants contended that the plaintiffs, being a statutory government body and/or a public authority, were not entitled to sue for defamation and therefore the plaintiffs' claim must be struck off with costs. The plaintiffs, on the other hand, submitted that the plaintiffs were not local authorities and as such had the legal capacity to bring an action for defamation and malicious falsehood under the Malaysian law. It was the plaintiffs' contention that Felda is not a government body but a body created by statute and was not a democratically elected body unlike the Derbyshire County Council and hence the principles of *Derbyshire* should not be applicable to the plaintiffs.

Held (dismissing preliminary issue; entering judgment on liability against the first, second and sixth defendants):

(1) The *Derbyshire*'s case was only limited to actions for defamation by local authorities, and did not expressly prohibit local authorities from maintaining an action in malicious falsehood. The case was not binding in Malaysia and was distinguishable from the instant case as the plaintiffs were not local authorities. (paras 39 & 40)

(2) Section 15(1) of the Act expressly provided the plaintiffs with the right to sue and be sued. In the absence of any express statutory restriction preventing the plaintiffs from taking action for libel, and in the light of the express provision of s. 15(1) of the Act, Felda is conferred with a power to institute civil proceedings of all types, including libel. It followed that only the Parliament and not the court that can take away the right or limit such right. (paras 49, 50 & 51)

(3) The Malaysian courts, not being parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) ('the Convention') are not bound by art. 10 of the Convention. Hence, pursuant to art. 10 of the Convention, local authorities and other government bodies could sue for defamation. (paras 54 & 57)

(4) The right to freedom of expression as provided in art. 10 of the Federal Constitution, is not unlimited. It is subject to restrictions prescribed by law or necessary in a democratic society or necessary for the protection of the reputation of rights of other. There has to be a balance between protection of the reputation and freedom of expression. Hence, the libel laws in Malaysia recognise the defence of fair comment, justification and privilege which would enable freedom of expression to flourish and be protected. (paras 58 & 60)

(5) The rationale for permitting corporations and other entities to sue for libel applied with equal force to statutory authorities. The need for a statutory authority, particularly Felda, to be able to sue for libel to protect its reputation is a real and pressing one. Damage to its reputation may make it more difficult for the authority to enter into transactions, obtain favourable credit and may jeopardise its Felda settlement scheme. In the circumstances, the issue raised by the defendants was answered in the negative and the court dismissed the preliminary issue. (paras 67 & 68)

Case(s) referred to:

Attorney-General v. Antigua Times Ltd [1976] AC 16 ***(refd)***
Bognor Regis Urban District Council v. Campion [1972] QB 169 ***(refd)***
Chee Siok Chin v. Minister for Home Affairs and Another [2005] SGHC 216 ***(refd)***
Dennis v. United States of America [1951] 341 US 494 ***(refd)***
Derbyshire County Council v. Times Newspaper Ltd & Ors [1992] QBD 770 ***(dist)***
Die Spoorbond & Anor v. South African Railways & Ors (1946) AD 999 ***(refd)***
Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd [1980] QB 585 ***(refd)***
Evans v. State of New South Wales [2008] FCAFC 130 ***(refd)***
Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd [1985] 2 CLJ 390; [1985] CLJ (Rep) 482 HC ***(refd)***
Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors [2013] 1 CLJ 107 HC ***(refd)***
Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2) [2013] 1 CLJ 124 HC ***(refd)***
Le Fanu v. Malcolmson (1848) 1 HL Cas 637 ***(refd)***

Manchester Corporation v. Williams [1891] 1 QB 94 ***(refd)***
Metropolitan Saloon Omnibus Co Ltd v. Hawkins (1859) 4 H & N 87 ***(refd)***
National Union of General and Municipal Workers v. Gillian [1946] KB 81 ***(refd)***
New South Wales Aboriginal Land Council v. Jones & Ors [1998] 43 NSWLR 300; [1998] NSW Lexis 647 ***(refd)***
South Hetton Coal Co v. North Eastern News Association Ltd [1894] 1 QB 133 ***(refd)***
The Co-Operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(a)
Federal Constitution, art. 10
Land Development Act 1956, ss. 3(3), 15(1), (2)

Convention For The Protection Of Human Rights And Fundamental Freedoms (1953) [EU], art. 10
Constitution of the Republic of Singapore [Sing], art. 14

For the plaintiffs - Firuz Hussein (Cheng Mai & Ahmad Al-Hady with him); M/s Hafarizam Wan & Aisha Mubarak
For the 1st, 2nd & 6th defendants - Francis Pereira (Prema Joseph with him); M/s Francis Pereira & Shan

Reported by S Barathi

JUDGMENT

Kamaludin Md Said J:

Introduction

[1] The plaintiffs' suit against the defendants is for tort of defamation over an article in the edition of the Suara Keadilan dated 22 June 2010 to 29 June 2010 which was published and circulated with headlines entitled "Felda Bangkrap" and a caption entitled "Kontroversi" with further continuation entitled "Bina Bangunan RM662 Juta Hanya Libatkan Tiga Individu".

[2] The plaintiffs claim that the article contains defamatory words which are serious and constitute a grave libel of the plaintiffs' reputations.

[3] The case is ready for trial.

[4] At the outset, the first, second and sixth defendants wanted to raise a preliminary issue.

[5] The defendants were in agreement with the plaintiffs that after hearing both parties' submissions and in the event this court dismiss the preliminary issue, the defendants will concede liability in this case. The plaintiffs can enter judgment on liability against the defendants. The issue of damages is to be assessed by the Senior Assistant Registrar.

[6] The preliminary issue is whether the plaintiffs' have the necessary capacity to bring an action for defamation and malicious falsehood, by reason that the first plaintiff is a statutory authority set up under the Land Development Act 1956 and the second plaintiff is a wholly owned subsidiary of the first plaintiff.

Submissions On Preliminary Issue

[7] The defendants submitted that Felda is a government/public body created for a particular objective and purpose. It undertakes activities for and on behalf of the government. Its public policies and objectives are that of the government's.

[8] The second plaintiff is a wholly owned subsidiary of Felda pursuant to s. 3(3) LDA. It was incorporated to carry out the activities of Felda. Its policies (in particular, its public policies) and objectives mirror that of FELDA's. It exists to facilitate the functions required of Felda.

[9] Thus, although being a company in nature, and therefore has a distinct legal form, it is, for all intents and purposes part of Felda, and as such, must be treated for the purposes of this submission as a government body.

[10] The defendants submitted that up until the year 1992, the common law in England was that a local authority or other government body could sue for defamation. That changed with the English Court of Appeal decision of *Derbyshire County Council v. Times Newspaper Ltd & Ors* [1992] QBD 770.

[11] The Court of Appeal of England held that consistent with art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (effectively, our art. 10 of the FC), local authorities and other government bodies could not sue for defamation.

[12] The Court of Appeal decision was upheld in the House of Lords (see *Derbyshire County Council v. Times Newspapers Ltd* [1993] AC 534).

[13] The House of Lords, however, felt that it did not need to rely on art. 10 of the European Convention because "in the field of freedom of speech there was no difference in principle between English law on the subject and art. 10 of the convention" (see p. 551). Thus, according to the House of Lords, the common law of England would not allow government authorities to sue for defamation.

[14] The House of Lords relied on case law from the United States and South Africa. The South African case, ie, *Die Spoorbond, South African Railways* 1946 AD 999 (see judgment dated 24 March 2011 of the High Court of South Africa in *Bitou Municipality & Lonwabo Ngoqo v. Memory Booysen & Paul Jordaan*, where material excerpts from the judgment of *Die Spoorbond* were cited), incidentally involved a local authority but a government department of South Africa, the South African Railways and Harbours.

[15] Principally, the reasoning in the *Derbyshire* case was that a government body should be open to uninhibited public criticism in a free democratic society. It would be contrary to public interest to fetter the freedom of speech to criticise such government/public bodies and it was in the interest of the public to allow such criticism. A

[16] The *Derbyshire* case has since been followed in England. See for example, *British Coal Corporation v. National Union of Mineworkers & Anor, Queens Bench Division* (Lexis Nexis) a case involving a government body, ie, the British Coal Corporation, who incidentally was also responsible to a Minister who was a member of a democratically elected government. B

[17] The defendants referred to the recent High Court case of *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107; [2013] 7 MLJ 52 where Justice Yeoh Wee Siam made express reference to *Derbyshire* and adopted the principles laid down therein. Justice Yeoh held that the state government is a public authority and as such it does not have a personal reputation to protect. It was therefore held that it is not in the interest of the public that the state government be allowed to institute or maintain any action for libel or slander against any person. C D

[18] Having decided as such, Her Ladyship went on to decide that the Menteri Besar had equally no capacity to maintain an action in defamation in his official capacity, as to allow him to do so would be contrary to the rationale and principles applied in *Derbyshire* (see *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2)* [2013] 1 CLJ 124; [2013] 7 MLJ 52). E

[19] It was submitted that the decision of *Kerajaan Negeri Terengganu* is absolutely correct and must be applauded. There is no reason why Malaysia should not follow the example of most of the progressive democratic countries and adopt the *Derbyshire* case. Even Zimbabwe has recently done so. F

[20] It was further submitted that Malaysia is, to a large extent, a thriving democracy. The 2008 elections have created what is effectively the beginning of a two party system in Malaysia. The alternative and electronic media is ever expanding and people from all walks of life now take part in debates concerning political and public issues. G

[21] The only logical step is to go one step further and disallow government bodies from suing in defamation. Private individuals forming part of that government body can still sue for defamation. Likewise, the government body itself which would be controlled by the government of the day can counter criticism by other means. H

[22] In the circumstances, the defendants submitted that the question of law of whether the principle of law enunciated by the House of Lords in *Derbyshire* ("*Derbyshire* principle") which was subsequently followed and I

A expanded by various other decisions in the Commonwealth should be accepted as part of the common law in Malaysia, should be answered in the affirmative.

[23] Following there from, the defendants submitted that the *Derbyshire* principle should not be confined to mere 'local authorities' alone but that it
B necessarily extends to statutory or government bodies and/or public authorities.

[24] The first plaintiff by reason of the Land Development Act 1956, is a statutory or government body and/or public authority created for a particular purpose.

C **[25]** The second plaintiff, although a company in nature, is a wholly owned subsidiary of the first plaintiff and is part of the first plaintiff incorporated to carry out the activities of the first plaintiff. The second plaintiff is therefore, for all intents and purposes, a statutory or government body and/or public authority.

D **[26]** Following there from, on the application of the *Derbyshire* principle, the first and/or second plaintiffs are not entitled to sue for defamation and as such the plaintiffs claim must necessarily be struck off with costs.

[27] On the other hand, the plaintiffs' counsel submitted that the United
E Kingdom House of Lords in the case of *Derbyshire County Council v. Times Newspapers Limited & Ors* [1993] AC 534 held that under the common law of England a local authority does not have the right to maintain an action for defamation.

[28] It was submitted that the plaintiffs is not a local authority. As such
F they have legal capacity to bring an action for defamation and malicious falsehood under Malaysian law.

[29] It was further submitted that there is a fundamental difference between the Derbyshire County Council and Felda, and this fundamental difference supports the argument as to why the *Derbyshire* principle is not applicable to
G Felda.

[30] The House of Lords in *Derbyshire* stressed great importance on the following:

> There are, however, features of a local authority which may be regarded
H as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a **democratically elected governmental body**, or indeed any governmental body, should be
I open to uninhibited public criticism.
> (emphasis added)

[31] The fundamental difference is that Felda is not a government body as such, it is a body created by statute. It is not a democratically elected body, unlike the Derbyshire County Council. Felda is not a local authority. Section 15(2) of the Land Development Act provides the mechanism for the appointment of members, who are not democratically elected.

[32] In *New South Wales Aboriginal Land Council v. Jones & Ors* CA 40541/97 [1998] 43 NSWLR 300; [1998] NSW Lexis 647, the Supreme Court of New South Wales in dealing with the issue of whether a local government corporation could maintain an action in defamation, emphasised the importance of determining whether the body in question is a democratically elected body exercising governmental powers.

At p. 3 it is stated:

> The **main question then** is whether the NSWALC is a **democratically elected body** exercising governmental powers for the purposes of the law of defamation. ... the NSWALC **can be described as a democratically elected body in that it is elected by people**, Aborigines.
>
> The further at page when analysing the relevant act under which the body was constituted, namely the Aboriginal Land Rights Act 1983:
>
> > This system of local self-government is, of course, based on race, but this is only an acknowledgement of the obvious purpose and effect of the 1983 Act ... **The system established by the 1983 Act is a democratic one, as an examination of its provisions demonstrates**.
>
> (emphasis added)

[33] The plaintiffs submitted that an examination of the provisions of the Land Development Act, particularly s. 15(2), would clearly show that Felda is not a democratically elected body. Therefore, the *Derbyshire* principle should not be applicable to the plaintiffs.

[34] In addition, plaintiffs submitted that the *Derbyshire County Council*'s case should not be construed as laying down principles which should be applied throughout the Commonwealth. The House of Lords specifically stated in the said case that:

> As regards the words "necessary in a democratic society" in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human Rights has established that "necessary" requires the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued. **The domestic courts have "a margin of appreciation" based upon local knowledge of the needs of the society to which they belong** ... Having examined other authorities he concluded, having carried out the balancing exercise requisite for purposes of Article 10 of the Convention, that there was no pressing social need that a corporate public authority should have the right to sue in defamation for the protection of its reputation.
> (emphasis added)

A **[35]** The plaintiffs submitted that the Malaysian courts should be persuaded that there is indeed a pressing social need to not allow parties to make false and unsubstantiated allegations against public bodies which would lead to serious damage to the reputations and commercial interests pursued by such corporations in the public interest.

B **[36]** Additionally, if false and unsubstantiated allegations are allowed to be made with impunity, then this would lead to serious discord and disharmony in the public realm and would have a destabilising effect on the nation.

[37] In the circumstances of this case, the statutory authorities have a reputation and there is no logic to distinguish them from other entities.

C

Decision Of This Court

[38] After hearing submissions from both counsels for the defendants and the plaintiffs, this court finds that the answer must be in the negative and dismissed the preliminary issue raised by the defendants on reasons as stated

D below.

[39] I totally agree with the plaintiffs' submission that the *Derbyshire* case is not binding in Malaysia. Further, it is distinguishable from this case. In my considered opinion, the *Derbyshire* case is only limited to actions for

E defamation by local authorities, and does not expressly prohibit local authorities from maintaining an action in malicious falsehood – further and in any event, the plaintiffs are not local authorities.

[40] The *Derbyshire* case only limited actions in defamation by local authority, and not corporations.

F **[41]** In the Court of Appeal case of *Lembaga Kemajuan Tanah Persekutuan & Anor v. Dr Tan Kee Kwong* (Court of Appeal Civil Appeal No. W-01 (NCVC) - 551-10/2011), the preliminary issue on the capacity of FELDA to institute proceeding in relation to the *Derbyshire* case has been ventilated and decided by the Court of Appeal. The majority decision is that the

G plaintiffs have the right to maintain an action for defamation.

[42] The above referred Court of Appeal decisions stemmed from the decision of the High Court of YA Dato' Zabariah in a related case concerning the same articles in Suara Keadilan against a different defendant, but involving the identical plaintiffs as this suit (the grounds of judgment of

H the High Court dated 9 October 2011 of Kuala Lumpur High Court Suit No. S-21 NCVC-27-2011).

[43] The grounds of decision of Linton Albert JCA dated 6 August 2012 at pp. 85-87 has clearly dealt with the *Derbyshire* case as follows:

I > The cross-appeal relates to the respondent's contention that the appellants as public authorities could not sue for defamation. There is no dispute relating to the 1st appellant being a government body, nor the 2nd appellant as wholly owned by the 1st appellant thereby to all intents and

purposes, a government body. The respondent relies on *Derbyshire County Council v. Times Newspaper Ltd. & Ors* [1992] QBD 770 a decision of the Court of Appeal which was affirmed by the House of Lords. The headnote in that case reads in part as follows:

> The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of certain newspaper articles which made allegations in relation to share dealings involving the investment of moneys from the local authority's superannuation fund, sometimes by a complex series of deals, in companies connected with or controlled by a businessman.
>
> Held, allowing the appeal, that, notwithstanding the general principle that a trading or non-trading corporation was entitled to sue in libel to protect so much of its corporate reputation, as distinct from that of its members, as was capable of being damaged by a defamatory statement, a local authority, as a corporate public authority, was not entitled at common law to sue for libel to protect its governing reputation; that to allow it to do so would impose a substantial and unjustifiable restriction on freedom of expression.
>
> It is submitted on behalf of the respondent that the principle in *Derbyshire County Council* ought to be applied as it has also been applied in several commonwealth jurisdictions. With respect, we do not find any justification for applying the *Derbyshire County Council* principle here. In particular section 15(1) of the Act gives the 1st appellant the right to sue, and to be sued. It would be preposterous for the court to take away a statutory right by applying English common law principles. Even section 3(a) of the Civil Law Act which allows for the application of English common law does not contemplate its application beyond that which is administered on 7th day of April, 1956. Finally it is patently clear that the facts in the instant appeal can be distinguished from the facts in the *Derbyshire County Council* case in that here the 1st and 2nd appellants are a statutory body and a company registered under the Companies Act 1965 respectively whereas there the entity in question was a Local Authority. They are therefore totally different entities. There was therefore no merit in the cross-appeal.

[44] In the grounds of judgment (Sulaiman Daud JCA) of 26 May 2012, His Lordship's decision relating to the *Derbyshire* case can be found at p. 79 as follow:

> Berkenaan dengan rayuan silang Defendan, saya bersependapat dengan kedua-dua rakan saya yang bijaksana bahawa hakim perbicaraan tidak tersilap dari segi fakta dan undang-undang dalam menolak isu awalan yang dibangkitkan oleh Defendan yang bersandarkan kepada kes *Derbishire*, *supra*. Sebagaimana yang dihujahkan oleh peguam terpelajar perayu kes itu yang telah diputuskan pada tahun 1993 tidak mengikat Mahkamah ini menurut kuasa seksyen 3(a) Akta Undang-Undang Sivil 1956 yang memperuntukkan hanya 'common law' yang ditadbirkan di England sebelum 7 April 1956 terpakai di Malaysia Barat. Keduanya,

A Plaintif pertama bukannya suatu pihak berkuasa tempatan tetapi suatu pertubuhan perbadanan yang mempunyai hak untuk mendakwa dan didakwa, manakala Plaintif Kedua pula adalah sebuah syarikat, berbanding dengan entity badan dalam kes tersebut.

[45] This court is bound by the principle of *stare decisis*, in the decision of
B the Court of Appeal as the plaintiffs are identical and there are no distinguishing factors.

[46] The doctrine of '*stare decisis*' is the corner stone of our legal system and in this regard, the Federal Court decision *The Co-Operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 of which sets out the principle
C succinctly:

> Our task in answering this question, has been made considerably easier by the assistance we have derived from the remarks of Lord Hailsham in *Cassell and Co. Ltd. v. Broome* [1972] AC 1027, which indicate the reaction of the House of Lords to the Court of Appeal's refusal to follow a
> D previous decision of the House on the ground that it had been given *per incuriam*.
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> Touching on the repercussions of the Court of Appeal advising Judges of first instance to ignore decisions of the House of Lords, Lord Hailsham said this (at p. 1054 B to D):
>
> E ... I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided "*per incuriam*" or "unworkable", they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to Judges of first instance to ignore decisions of the House of Lords in this way and,
> F if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put Judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lord Justices
> G would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or
> H defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.
>
> And, in a famous passage (at p. 1054 D and E) Lord Hailsham concluded this part of the case, by saying:
> I
> The fact is, and I hope that it will never be necessary to say so again, **that in the hierarchical system of Courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal,**

> **to accept loyally the decisions of the higher tiers**. Where decisions manifestly conflict, the decision in *Young v. The Bristol Aeroplane Co.* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.
> (emphasis added)

[47] The Court of Appeal decision above is very clear on the *Derbyshire County Council* principle which has no application in Malaysia. In fact there are no other Malaysian cases which state that a statutory body cannot maintain an action in defamation. Therefore, it is my considered opinion that the *Derbyshire* case is not binding in Malaysia.

[48] I am also of the same view of the Court of Appeal judgment that the *Derbyshire* case, which was decided in 1993, is not binding in Malaysia because:

(a) Section 3(a) of the Civil Law Act 1956 provides that:

> 3. Application of UK common law, rules of equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or any part thereof, apply the **common law of England and the rules of equity as administered in England on the 7th day of April 1956**.
> (emphasis added)

(b) Therefore, pursuant to the said section, the decision of *Derbyshire* in 1993 is after 7 April 1956, and therefore, is not binding authority in Malaysia;

(c) The common law of England as at 7 April 1956 allowed public authorities to maintain an action in defamation for libel affecting property: *Manchester Corporation v. Williams* [1891] 1 QB 94;

(d) The common law of England as at 7 April 1956 also expressly recognises that a company can maintain an action for libel on matters reflecting on the management of its business, method of conducting its affairs, mismanagement, fraud or financial position: *South Hetton Coal Co v. North Eastern News Association Ltd* [1894] 1 QB 133. Lord Esher said:

> If a firm or a corporation carry on a business, they may carry it on in such a way as to lead a person to say that they carried it on in a bad way. Such a statement would be a libel on the business, and the law is the same as in the case of an individual. That statement, if true, would lead an ordinary person to say that they managed their business in so inefficient a way as to lead people to entertain feelings of contempt or ridicule towards them. It follows, therefore, that the law is the same in all respects in the case of a corporation and of an individual.

(e) The *Derbyshire* case was a departure from the previous position under English law which held that local authorities could sue for defamation: *Bognor Regis Urban District Council v. Campion* [1972] QB 169; and

(f) *Bognor Regis Urban District Council v. Campion* [1972] 2 QB 169 was the authority for the proposition that a local authority has a reputation, which it can protect by an action for libel.

[49] I am also of the same view of the Court of Appeal judgment that in Malaysia, and specifically in relation to the plaintiffs, there is a statutory provision which expressly gives the plaintiff the right to sue and be sued. Section 15(1) of the Land Development Act 1956 states:

> (1) The Authority shall be by virtue of this Act a body corporate to be known as the Federal Land Development Authority, and shall have perpetual succession and **may sue and be sued** in its said name and may do all other matters and things incidental or appertaining to a body corporate and not inconsistent with this Act.
> (emphasis added)

[50] Therefore, in the absence of any express statutory restriction preventing the plaintiff from taking action for libel, and in light of the express provision of s. 15(1) of the Land Development Act 1956, Felda is conferred with a power to institute civil proceedings of all types, including libel.

[51] It follows that as Felda has a statutory right to sue (s. 15(1)), only Parliament, and not the courts, can take away that right or limit such a right. (See *Dennis v. United States of America* [1951] 341 US 494).

[52] As pointed by the plaintiffs' counsel in the Singaporean case of *Chee Siok Chin v. Minister for Home Affairs and Another* [2005] SGHC 216, the High Court of Singapore considered the issue and observed as follows:

> In rounding up, I should also advert to a recent legal development in England in relation to the ability of local government bodies to protect their reputations. In England, the former view that a local government corporation had a "governing" reputation protected by the law of defamation no longer represents English law: *Derbyshire County Council v. Times Newspapers Ltd* [1993] AC 534. The case, however, makes it clear that the decision itself does not affect the right of an individual member or officer of a government body to sue if the statement about the body is capable of being interpreted as referring to the individual. Indeed, the ability of the individual to sue seems to be regarded as a reason for denying such a right to the body: *Gatley on Libel and Slander* ([64] *supra*) at para 8.20.
>
> **It can be fairly said that this abrupt change of position in England in 1993 is not a development of the common law but rather a change of the law of a legislative rather than a judicial character**: see Mahoney JA's observations in *Ballina Shire Council v. Ringland* (1994) 33 NSWLR 680. In his trenchantly-worded dissenting judgment at 723, Mahoney JA also pointedly observed:

> To me, it is not apparent that, in relation to the right to defame public authorities, the balance achieved by the law of defamation is wrong or that, if it be wrong, **it cannot be adjusted by anything less than a complete withdrawal of the law**. I am conscious that Their Lordships spoke at a time when the topic had currency in England and that it, or a connected matter, the immoderate dealing with Royalty and those in public position, was being examined. Their conclusion that in the case of the public authorities the restrictions imposed by the law of defamation should be withdrawn was, it may be, the appropriate assessment for England of the then competing claims. In so far as it may be relevant, I am not satisfied that that conclusion is applicable to Australia. **At the least, the correctness of the present balance and of the alternatives to withdrawal of the law of defamation from public authorities require closer examination**.
> (emphasis added)

I am by and large in agreement with the views of Mahoney JA and can do no better, at this juncture, than to echo and emphasise the ultimate sentence of the quote.

[53] Therefore, if the intention is to withdraw the right of statutory authorities and government bodies of the right to sue for defamation, such a matter has to be done by Parliament and not by the courts.

[54] At some points the defendants have contended that the Court of Appeal of England held that consistent with art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (effectively, our art. 10 of the FC), local authorities and other government bodies could not sue for defamation.

[55] I disagree with defendants' contention. Further, as correctly submitted by the plaintiffs' counsel, the Malaysian courts should not blindly and slavishly follow the House of Lords decision on this point, particularly because the English courts had to also consider the effect of art. 10 of the European Convention on Human Rights to which the United Kingdom has to adhere to.

[56] In *Evans v. State of New South Wales* NSD 1018 of 2008, [2008] FCAFC 130, the Federal Court of Australia observed as follows:

> There is a particular rule of the common law which gives effect to the value of freedom of speech by preventing local authorities and public authorities from suing for defamation: *Derbyshire County Council v. Times Newspapers Ltd* [1993] AC 534. In that case the House of Lords said it would be contrary to the public interest to allow a local authority to sue "because to admit such action would place an undesirable fetter on freedom of speech" (at 549). The same principle was applied by the New South Wales Court of Appeal in *Ballina Shire Council v. Ringland* (1994) 33 NSWLR 680. *In both the House of Lords and the New South Wales Court of Appeal reference was also made to international conventions on human rights to which the United Kingdom and Australia respectively are parties which involve the protection of freedom of speech*. (emphasis added)

[57] The Malaysian courts are not parties to that Convention and therefore, are not bound by art. 10 of the Convention on Human Rights.

[58] It is my considered opinion that regard should be had to the fact that the right to freedom of expression is not unlimited. It is subject to restrictions which are prescribed by law, or necessary in a democratic society, or necessary for the protection of the reputation or rights of others. Any restriction should be proportionate to its aim. (See *Attorney-General v. Antigua Times Ltd* [1976] AC 16, at pp. 25-28.)

[59] Article 10 of the Federal Constitution which gives us freedom of speech and expression expressly states that it is subject to certain restrictions. It states:

> (1) Subject to Clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
> ...
>
> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.
> (emphasis added)

[60] I agree with the plaintiffs' counsel and it is my considered opinion too that there has to be balance between protecting reputation and freedom of expression. In the event the concern here is the fetter of freedom of expression, it must be highlighted that the libel laws in Malaysia recognises the defence of fair comment, justification and privilege which would enable freedom of expression to flourish and be protected.

[61] In the Singaporean case of *Chee Siok Chin v. Minister for Home Affairs and Another* (*supra*), the High Court of Singapore analysed the Singaporean Constitution art. 14 (which is similar to art. 10 of the Malaysian Federal Constitution) on the issue of freedom of speech being balanced with restrictions as may be expedient in the interest of public order, and observed as follows:

> [50] It is also crucial to note that the legislative power to circumscribe the rights conferred by Art 14 of the Constitution is, *inter alia*, delineated by what is "in the interest of public order" and not confined to "the maintenance of public order". This is a much wider legislative remit that allows Parliament to take a prophylactic approach in the maintenance of public order. This necessarily will include laws that are not purely designed or crafted for the immediate or direct maintenance of public order, according to Mahendra P Singh, *V N Shukla's Constitution of India* (*Eastern Book Company*, 9th Ed, 1996) at p 113:

> The expression 'public order' is synonymous with public peace, safety, and tranquillity. It signifies absence of disorder involving breaches of local significance in contradistinction to national upheavals such as revolution, civil strife or war, affecting the security of the State. To illustrate, the State may, in the interests of public order, prohibit and punish the causing of loud and raucous noise in streets and public places by means of sound amplifying instruments; *regulate the hours and place of public discussions and the use of public streets for the purpose of exercising freedom; provide for expulsion of hecklers from meetings and assemblies; punish utterances tending to incite breach of the peace or riot and use of threatening, abusive or insulting words or behaviour in any public place or at any public meeting* with intent to cause a breach of the peace or whereby breach of the peace is likely to be caused, and all such acts as would endanger public safety.
> (emphasis added)
>
> [51] There is nothing irregular, arbitrary, or unusual about Parliament's right to limit the right of assembly or freedom of speech. The genealogy of Art 14 of the Constitution can be traced back to the *Report of the Federation of Malaya Constitutional Commission 1957* (G A Smith, 1957) (at para 162) where it was recommended "*that freedom of speech and expression should be guaranteed to all citizens subject to restrictions in the interests of security, public order or morality or in relation to incitement, defamation or contempt of court*".
> (emphasis added)
>
> [52] This approach has also in one form or the other been adopted time and again in several other jurisdictions. The tension between the individual's right to speak and/or to assemble freely and the competing interests of security and/or public order calls into play a delicate balancing exercise involving several imponderables and factors such as societal values, pluralism, prevailing social and economic considerations as well as the common good of the community. Consideration of such public policy is exceedingly complex and multifaceted. While the clarion call for unfettered individual rights is almost irresistibly seductive, it cannot, however, be gain said that individual rights do not exist in a vacuum. Permitting unfettered individual rights in a process that is value-neutral is not the rule of law. Indeed, that form of governance could be described as the antithesis of the rule of law – a society premised on individualism and self-interest.

[62] Therefore, it is my considered opinion that the rationale in *Derbyshire* in upholding freedom of speech, has to be considered in light of our art. 10 of the Malaysian Federal Constitution and the express restrictions to such right.

[63] At common law, trading corporations can sue for libel: *Metropolitan Saloon Omnibus Co Ltd v. Hawkins* (1859) 4 HN 87. It is not necessary for the corporation to prove actual damage: *South Hetton Coal Co Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133.

[64] In *Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd* [1985] 2 CLJ 390; [1985] CLJ (Rep) 482; [1985] 2 MLJ 469, the High Court recognised that a company lost its reputation as a result of dishonour of bank drafts and awarded damages. It also held that the company need not prove actual damage.

[65] Further, non-trading corporations can also sue: *National Union of General and Municipal Workers v. Gillian* [1946] KB 81. So, too, can trade unions: *Electrical, Electronic, Telecommunication and Plumbing Union v. Times Newspapers Ltd* [1980] QB 585.

[66] All these entities have a legitimate entitlement to protect its reputation from defamatory attacks. In addition, a partnership (which does not have a separate legal personality) is entitled to sue in its own name for damage done to its reputation: *Le Fanu v. Malcolmson* (1848) 1 HL Cas 637.

[67] Therefore, I agree with the plaintiffs' counsel contention, the need for a statutory authority, and particularly Felda, to be able to sue for libel to protect its reputation is a real and pressing one. Damage to its reputation may make it more difficult for the authority to enter into transactions, obtain favourable credit, and may jeopardise its Felda settlement scheme.

[68] It is my considered opinion that the rationale for permitting corporations and other entities to sue for libel applies with equal force to statutory authorities.

Conclusion

[69] This court is bound by the doctrine of *stare decisis* and the Court of Appeal decision on the relating matter concerning the plaintiffs' right to maintain an action in defamation is binding upon this court.

[70] The *Derbyshire* case is not binding and not applicable in Malaysia because of the following reasons:

(i) Section 3(a) of the Civil Law Act 1956 – *Derbyshire* case was decided after 1956;

(ii) *Derbyshire* is distinguishable as it was decided in light of art. 10 of the European Convention on Human Rights. Malaysia is not party to the Convention and not bound;

(iii) Article 10 of Malaysian Federal Constitution allows for balance between freedom of expression on one hand and restrictions in the interest of public order and defamation on the other;

(iv) Section 15(1) of the Land Development Act – expressly give Felda the right to sue and be sued. Only Parliament can take away the right or limit such right;

(v) *Derbyshire* principle is distinguishable as Felda is not a democratically elected body;

(vi) Malaysian court have to consider the public interest in Malaysia; and

(vii) Statutory authorities also have reputation no different from other entities.

[71] The preliminary issue raised by the defendants is answered in the negative and this court dismissed the preliminary issue. As agreed by the defendants that upon dismissal of the preliminary issue, the plaintiffs are at liberty to enter judgment on liability against the first, second and sixth defendants.

[72] Therefore, judgment on liability is entered against the first, second and sixth defendants. Damages including aggravated and/or exemplary damages in prayer (1) are to be assessed by the Senior Assistant Registrar. Prayers (2) and (3) are allowed. Prayer (4) is not allowed and costs on the preliminary issue to the plaintiffs will be awarded after the assessment of damages proceeding before the Senior Assistant Registrar.